JOHORE REPORT.

[APPELLATE CIVIL JURISDICTION]
McELWAINE, C.J. (S.S.)
TERRELL & HORNE, JJ.
April 30, 1938.

ABU BIN MOHAMED (Appellant)

v.

VOO FUI TONG & ANOR. (Respondents)

[JOHORE CIVIL APPEAL No. 1 of 1938]

Practice—appeal—further security for costs —lateness of application for—considerations affecting Court's discretion—Courts Enactment, Ss. 20, 21.

Approximately two months after notice of appeal had been given and shortly before the date fixed for the hearing of the appeal, the respondents gave notice that they intended to move the Court of Appeal for an order for further security for the costs of the appeal and for the costs of the action in the Court below. There was, however, no prior demand for security. Before the appeal came on for hearing, the respondents had caused the appellant's property to be taken in execution. The value of this property had been materially diminished by a fire for which the respondents were alleged to have been responsible and which gave rise to the Suit.

Held, that the application should be dismissed on the grounds that there had been undue delay in making it and that the appellant's poverty which was relied on in support thereof had been brought about by the alleged wrongful act of the respondents.

Farrer v. *Lacy Hartland & Co.*, 28 Ch. D. 485 applied.

APPEAL.

Goho for the appellant.

Seth for the respondents.

Cur. Adv. Vult.

MCELWAINE, C.J.—The appellant gave notice of appeal on 22nd January, 1938. The hearing of the appeal was fixed for 26th March, 1938, and on 21st March, after the hearing date had been fixed and almost two months after notice of appeal had been given, the respondents gave notice that they would move the Court of Appeal on 26th March for an order that the appellant do furnish security in the sum of $600 for the costs of the appeal and that he be ordered to give security in the sum of $750 on account of the taxed costs of the action in the Court below and that if the security be not given within three weeks that the appeal do stand dismissed.

The ordinary rule is that when the respondent can shew that the appellant, if successful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made. *Hall* v. *Snowdon. Hubbard & Co.*, (1899) 1 Q.B., at p. 594. *In re Ivory*; *Hankin* v. *Turner*, 10 Ch. 376. *Narlock* v. *Ashberry*, 19 Ch. D. 84.

The rule is the same when there is incapacity to pay. *Whittaker* v. *Kershaw*, 44 Ch. D., 296. See *Hills* v. *London Passenger Transport Board*, (1937) 4 All Eng. R., 230:

> "The mere fact that there was a point of law which was reasonably fit for argument was not a sufficient ground for dispensing with security for costs. Even when there was such a point of law the practice of the Court was to have regard to all the circumstances of the case."

Everett v. *Islington Guardians*, (1923 W.N., 72). But the Johore Courts Enactment by section 20 requires an appellant to lodge $100 as security for costs. This has been done. Section 21 empowers the Court of Appeal in any case where it shall think fit to order further security for costs to be given.

I do not think this a case in which further security for costs of the appeal should be ordered. There has been undue delay in making this motion. There has been no prior demand for security.

To quote from the judgment of Cozens Hardy M. R. in *Wille* v. *St. John*, (1910) 1 Ch. at 704:

> "If an impecunious litigant who has not obtained an order to sue *in forma pauperis*, the respondent ought, under ordinary circumstances, to ask the appellant by letter to give security. If the appellant does not answer the letter by saying that he is prepared to give security or by saying that he intends to apply for a pauper order, the respondent may apply for security for costs. An order ought not to be made if substantially all the costs of the appeal have been previously incurred."

In the present case substantially all the costs of the appeal had been incurred before the notice of the motion for further security was given.

The second application is for security of the costs in the Court below. Mere non-payment of those costs is not in itself a ground for further security. *Hills* v. *London Passenger Transport Board*, (1937) 4 All Eng. R., 230. Here there is some strong indication of inability to pay. But that inability may well have been caused by the depreciation of the appellant's land by the fire which is the cause of action and for which, if the appellant is right the respondents are responsible. Also long after notice of appeal had been given the respondents sold this land by forced sale.

In *Rourke* v. *White Moss Colliery Co.*, 1 C.P.D., 556 as explained in *Farrer* v. *Lacy, Hartland & Co.*, 28 Ch. D., 482, security was not ordered because if "the plaintiff was right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action."

The appellant's present circumstances have arisen from the fire which seriously diminished the value of his assets, and as the issue is, were the respondents responsible for that fire which

has caused his property to be insufficient to meet the costs in the Court below, then, following *Rourke's case*, security should not be ordered.

I express no final opinion on the merits of the appeal, but I can at least say that the appeal has no appearance of being frivolous.

Although not exactly in point I think *Stevens* v. *Walker*, (1936) 2 K.B., 215; 52 T.L.R., 502 affords some general assistance. That was a case in which a motion was made to remit a case to the County Court on failure of the plaintiff to give security for costs. Lord Wright, M.R. said at page 221:

> "There is another most material matter which the Court would take into account when considering the relevant circumstances of the case for this purpose; (i.e., deciding whether to remit): that is the question whether or not the plaintiff has a good prima facie cause of action, and whether or not the defendant has a good prima facie defence."

The case appears a fit one for appeal, but how the appeal will be decided is an open question.

I would add that this motion which came on on the day fixed for hearing of the appeal took up a substantial portion of the time which the appeal itself would have occupied.

Having regard to all the circumstances of the case I am of opinion that the motion must be dismissed with costs.

TERRELL, J.—The application is in two parts:—

(a) for further security of the costs of the appeal, and

(b) for security for the unpaid costs in the Court below.

The question of security for costs is dealt with by section 21 of the Courts Enactment which reads as follows:—

> "The Court of Appeal may, in any case where it shall think fit, order further security for costs to be given. Such order may extend to requiring security to be given for the costs of the original suit where the appellant is residing out of the State and is not possessed of any sufficient immovable property within the State, other than the property (if any) to which the appeal relates; or where, by reason of other special circumstances, the Court of Appeal is of opinion that security for payment of past costs should be given."

It will be seen that as regards ordering further security of the costs of the appeal, the Court has an absolute discretion; but as regards requiring security for the costs in the Court below, certain rules are laid down. Ordinarily such security is only ordered where the appellant is residing out of the jurisdiction *and* is not possessed of any sufficient immovable property within the State; *or* where there are *other* special circumstances. This is a clear dichotomy. Where therefore the appellant resides within the jurisdiction, the "special circumstances" must be something other than the non-possession of immovable property, but such special circumstances would no doubt include poverty or the fact that the appeal was vexatious or an abuse of the process of the Court. In this case the poverty of the appellant has been alleged as a special circumstance.

As to the principles upon which the Court should act, it appears to me that the discretion of the Court should be exercised according to the same principles as are followed by the Court of Appeal in England under English Order 58 Rule 15. Although under this rule there is no jurisdiction to order security for past costs, the fact that past costs have not been paid has frequently been accepted as prima facie evidence of inability to pay the costs of the appeal. In this court the principles upon which the discretion of this Court should be exercised will be the same, where the special circumstance is the poverty of the appellant, whether the application be for security for the unpaid costs below or for further security of the costs of the appeal, although in the latter case the fact that there is a statutory deposit of $100 must be taken into consideration. Section 16 (ii) of the Courts Enactment specially adopts the English practice in these matters. I do not, therefore, agree with the dictum of the F.M.S. Court of Appeal in *Yap Chin Fook* v. *Thean Lip Thoong*, 5 F.M.S.L.R. p. 1, that, because of the statutory deposit of $100, the Indian decision should be followed rather than the English decisions. The ruling was accepted by Sir Lancelot Elphinstone, sitting as a single Judge of the Court of Appeal, in *Joseph* v. *P. L. M. Muthiah Chettiar & anor.*, (1931-32) F.M.S.L.R. p. 82. On the other hand, in the case of *T. Gnanamuthu* v. *Muthiah Chetty*, 6 F.M.S.L.R. p. 73, the full Court of Appeal of the F.M.S., though professing to follow the decision in *Yap Chin Fook* v. *Thean Lip Thoong*, ordered further security for the costs of the appeal, upon the same grounds as security should have been ordered by the Court of Appeal in England.

It is not necessary for me to review all the English authorities. The result of such authorities I take to be this:—

(1) The probability that the appellant will be unable to pay the costs of the appeal if unsuccessful as a special circumstance which will generally entitle the respondent to an order for further security.

(2) The fact that there is a point of law reasonably fit to argue will be taken into consideration in fixing the amount of the security, but will not in itself be considered a sufficient ground for dispensing with security altogether. (*Everett* v. *Islington Guardians*, 1923 W.N. p. 72).

(3) Where the insolvency of the appellant has been brought about, or contributed to, by the

wrongful act complained of in the action, it would be a denial of justice to require security on the ground of such insolvency (*Farrer* v. *Lacy Hartland & Co.* 28 Ch.D. at p. 485). In the present case the value of the plaintiff s property has been seriously diminished by the alleged wrongful act of the defendants. The defendants' subsequent seizure of the property, so diminished in value, for payment of their costs, has resulted in the plaintiff having no property at all.

(4) The application must be prompt. The respondents could have their application as soon as notice of appeal was given. There was no need to wait until the plaintiff's land had been taken in execution. It was oppressive to wait until the appellant, probably with the help of friends, had actually briefed counsel.

The Court of Appeal in England, though following general principles, has never bound itself by hard and fast rules, but has looked at all the circumstances of the case. When considered this point of view, I agree that the application for further security should be refused with costs.

HORNE, J.—There is no difference between the security for costs viz. $100, which an appellant must furnish by deposit under section 20 of the Courts Enactment (No. 54) and the further security which, the Court of Appeal may, if it thinks fit, order to be given. Only in the case of the discretionary amount the security need not be by lodgment of cash but may take some other form. The matters which have to be considered on an application to increase the security are the same as those which arise on an application under rule 15 of Order 58 Rules of the Supreme Court, England; but the fact that $100 has already been lodged has to be taken into account. I do not therefore agree with the view taken in *Yap Chen Fook* v. *Thean Lip Thoong*, 5 F.M.S.L.R. 1, that the English decisions are inapplicable. These decisions appear to me to show that the Court of Appeal has laid down certain rules which will normally guide it in the exercise of their discretion, but have not intended to fetter that discretion. And by reason thereof it has become the practice to apply by letter to apply promptly and for the Court generally to order security when inability to pay is established.

In this State the matter arises out of Section 21 of the Courts Enactment. The first sentence of section 21 gives a general discretion as to further security for the costs of the appeal. The latter part of the section deals with past costs. We are asked by this motion to order further security both in respect of the costs to be incurred and the past costs. My view of section 21 is that, so far as this motion is concerned, it is a matter of discretion whether security should be ordered both as to the costs of the appeal and as to past costs.

If unsuccessful in this appeal, the appellant according to the respondents' affidavit will be unable to pay the respondents' costs. In *Harlock* v. *Ashberry*, (1881) 18 Ch.D. 84 that ground has been held to be sufficient in England to order security to be given. In that case there was a substantial question of law to be argued but whether security was actually given or waived is not known. The appeal was heard (see 19 Ch.D. 539) and was successful and no order was made as to costs. Nowadays such a case would obviously be dealt with under the Poor Persons Rules. Poverty does not appear therefore to weigh so heavily against an appellant as it did fifty years ago.

In this case the appellant has failed to obtain a pauper order, for reasons which are not sufficiently clear. He was in a state of very doubtful solvency, and I should say was unable, in January, to have been capable of paying the respondents' costs of this appeal if so ordered. Consequently an application for increased security should have been made at that time by letter and the appellant would then have had another opportunity to apply for a pauper order. In my view therefore this application has not been prompt.

Although inability to pay is a circumstance to be taken into account, it is not an absolute rule. Lord Usher, M.R. in *Hood Barrs* v. *Heriot*, (1896) 2 Q.B. p. 376 states: "All that this Court has ever held is that poverty or inability to pay is a special circumstance, and, where it exists the Court must consider whether in the particular case it will order security to be given. The Court is not bound in such a case to order security to be given. It has a discretion in the matter which it has exercised on many occasions." In *Farrer* v. *Lacy, Hartland & Co.*, (1885) 28 Ch.D. 485, it was held that where the insolvency of the applicant has arisen from what (if the appellant is right) was the wrongful act of the respondent; the security will not be ordered. A similar view was taken by the Divisional Court in *Pritchett* v. *Poole*, 76 L.T. 472.

Applying those principles it appears that in this case the appellant was the owner of 105 acres of land subject to charges amounting to nearly $5,000. The land has been sold in execution proceedings taken by respondent Twenty-five acres of rubber trees thereon had been destroyed by a fire, which gave rise to the suit. The property must have been depreciated by the fire to an extent which has caused the appellant's insolvency. Although insolvency is established, this is a case in which I think the Court should follow *Rourke* v. *White Moss Colliery Company*, 1, C.P.D. 562 as explained in *Farrer* v. *Lacy, Hartland & Co.* 28 Ch.D. To do otherwise, as there is here an arguable appeal, would be a denial of justice.

I agree that the application be refused.

Motion dismissed.